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Attorneys for Defendants
MATTEL, INC. AND FISHER-PRICE, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

AMY HARRINGTON, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

MATTEL, INC. a Delaware Corp., and
FISHER-PRICE INC. a Delaware Corp., and
DOES 1 through 100, inclusive,

Defendants.

Case No. 07-05110 (MJJ)

**[PROPOSED] ORDER DENYING
PLAINTIFF'S MOTION TO REMAND**

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2 I. BACKGROUND

3 This action is one of eighteen putative class actions currently pending in federal district
4 courts which were all filed following voluntary toy recalls announced by Defendants on August 2,
5 August 14, September 4, and October 25, 2007. On September 5, 2007, Defendants filed a
6 motion with the Judicial Panel on Multidistrict Litigation (the “JMPL”) seeking to have all of the
7 cases coordinated for pretrial in one proceeding in the United States District Court for the Central
8 District of California. The JMPL has set the motion to transfer for hearing on November 29,
9 2007.

10 Plaintiff in this action served Defendants with the complaint and summons on
11 September 11, 2007. Defendants timely removed this case on October 4, 2007 pursuant to the
12 Class Action Fairness Act of 2005, (“CAFA”), codified in relevant part at 28 U.S.C. §§ 1332(d)
13 and 1453. On November 5, 2007, Plaintiff filed a Motion to Remand (“Motion”). The Motion is
14 based on only two grounds: (1) Plaintiff contends Defendants have not proved by a
15 preponderance of evidence that the amount in controversy exceeds the \$ 5 million CAFA
16 jurisdictional threshold; and (2) that the case is subject to remand based upon the home-state
17 controversy exception of 28 U.S.C. § 1332(d)(4)(B). Plaintiff does not set forth any other basis
18 for remand.

19 II. LEGAL STANDARD

20 A. AMOUNT IN CONTROVERSY

21 Under CAFA, the controlling question for purposes of evaluating the amount in
22 controversy requirement is whether the aggregate amount of damages and other relief sought for
23 the alleged class exceeds \$ 5 million. If the court is uncertain whether the threshold is met, “[t]he
24 district court should interpret expansively its power to aggregate individual class members claims,
25 and where the court is in doubt whether the aggregated claims exceed \$ 5 million, the court
26 should err in favor of exercising jurisdiction over the case.” *Romeo v. The Home Depot U.S.A.,*
27 *Inc.*, 2006 U.S. Dist. LEXIS 79881, at * 4-5 (S.D. Cal. Oct. 30, 2006) (quoting from S. Rep. No.
28 109-14, at 42 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 41).

Plaintiff seeks unspecified damages and a broad range of relief on behalf of the putative class. To meet the CAFA amount in controversy standard, Defendants need only show by a “preponderance of the evidence” that \$ 5 million is put at issue. *Guglielmino v. McKee Foods Corp.*, 2007 U.S. App. LEXIS 23654, at *14 (9th Cir. October 9, 2007). Thus, Defendants need only “produce underlying facts showing only that it is *more likely than not* that the amount in controversy exceeds \$ 5,000,0000, assuming the truth of the allegations plead in the Complaint.” *Muniz v. Pilot Travel Centers LLC*, 2007 WL 1302504, at *5 (E.D. Cal. May 1, 2007) (slip copy) (emphasis in original); *see also Davis v. Chase Bank U.S.A., N.A.*, 453 F. Supp. 2d 1205, 1208 (C.D. Cal. 2006). This “burden is not daunting, as courts recognize that under this standard, a removing defendant is *not* obligated to research, state, and prove the plaintiff’s claims for damages.” *Muniz*, 2007 WL 1302504, at *2 (emphasis in original) (quotation and citation omitted).

B. 28 U.S.C. § 1332(D)(4)(B) “HOME-STATE” CONTROVERSY EXCEPTION

The Ninth Circuit holds “that the party seeking remand bears the burden of proof as to any exception under CAFA.” *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1019 (9th Cir. 2007). Thus, Plaintiff bears the burden of proving that two-thirds or more members of the putative class and the “primary defendants” are citizens of California. *See* 28 U.S.C. § 1332(d)(4)(B) exception to CAFA (“home-state controversy exception”).

III. ANALYSIS

A. AMOUNT IN CONTROVERSY

In the Notice of Removal, Defendants focused on one component of the alleged class and provide evidence that approximately 29,900 products subject to the August 2, 2007 recall were sold to consumers in California. Focusing on the consumer component of the alleged class, the question then is what is the amount in controversy put at issue by Plaintiff’s Complaint. The “ultimate inquiry is what amount is put ‘in controversy’ by the plaintiff’s complaint, not what a defendant will actually owe.” *Muniz*, 2007 WL 1302504, at *3; *Levine v. Bic USA, Inc.*, 2007 WL 2406897, at *2 (S.D. Cal. Aug. 20, 2007). While all of Plaintiff’s requested relief must be included in assessing the aggregated CAFA amount in controversy, the potential costs associated

1 with Plaintiff's demand for putative class-wide medical testing and monitoring alone meet the
2 requisite amount in controversy.

3 Plaintiff's claims for medical testing and medical monitoring relief put at issue two
4 separate components: 1) medical testing for detection of lead poisoning (Complaint, ¶¶ 21; 22;
5 32); and 2) subsequent, future, medical monitoring (Complaint, ¶¶ 52; 58). Based upon published
6 materials recommending at least two different blood lead level tests ("BLL tests") and a clinical
7 examination, as well as a showing that a single BLL test is more than \$ 60, it is likely the costs
8 per child would exceed \$ 200. Thus, given the size of the putative class and potential medical
9 testing and medical monitoring costs in excess of \$ 200 per putative class member, it is *more*
10 *likely than not* that the amount in controversy exceeds \$ 5 million on just these costs alone even
11 before adding Plaintiff's estimated \$ 1.45 million for restitution and warranty economic relief.
12 *See Sanchez v. Wal-Mart Stores, Inc.*, 2007 WL 1345706 at *2 (E.D. Cal. May 8, 2007) (slip
13 copy); *see also Davis*, 453 F. Supp. 2d at 1208 ("[plaintiff] provides no evidence that
14 [defendants'] calculations are incorrect, and given the allegations, this amount seems a reasonable
15 estimate."); *Robinson v. Cheetah Transp.*, 2006 U.S. Dist. LEXIS 10129, at *8-9 (W.D. La. Feb.
16 24, 2006). Assuming the truth of the allegations in Plaintiff's Complaint and totaling all the costs
17 Plaintiff seeks to impose on Defendants, Defendants have met their burden by showing that it is
18 more likely than not that the amount in controversy exceeds \$ 5 million.

19 B. 28 U.S.C. § 1332(D)(4)(B) "HOME-STATE" CONTROVERSY EXCEPTION

20 Plaintiff bears the burden of proving the home-state controversy exception. While
21 Plaintiff cites to the residency of putative class members, the home-state controversy exception is
22 based on citizenship. As "[c]itizenship is determined by one's 'state of domicile,' not his state of
23 residence," *Kanaan v. Freescale Semiconductor, Inc.*, 2007 U.S. Dist. LEXIS 11736, *6 (N.D.
24 Cal. Feb. 5, 2007), Plaintiff's failure to prove that two-thirds or more of the putative class are
25 citizens of California is fatal to her invocation of the exception. *See Anthony v. Small Tube Mfg.*
26 *Corp.*, 2007 U.S. Dist. LEXIS 73064, at *12 (E.D. Pa. Sept. 27, 2007). Plaintiff's "primary
27 defendant" argument fails because Plaintiff asserts claims and alleges direct liability against both
28 Fisher-Price and Mattel. Plaintiff's unsupported assertion that Mattel is the primary defendant

1 fails to meet Plaintiff's burden of proof as to both the home-state controversy exception and
2 fundamental elements of corporate law.

3 IV. CONCLUSION

4 For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Remand.

5 **IT IS SO ORDERED.**

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7 Dated: _____, 2007

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9 By: _____
10 Judge Martin J. Jenkins
11 United States District Judge
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